

Declaratory Judgment Actions: Remedies

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A “‘remedy’ is defined as ‘[t]he means of enforcing a right or preventing or redressing a wrong; legal or equitable relief.’” *Horner v. Dep’t of Mental Health, Mental Retardation, & Substance Abuse Servs.*, 268 Va. 187, 192, 597 S.E.2d 202, 204 (2004) (quoting BLACK’S LAW DICTIONARY 1296 (7th ed. 1999)), *overruled in part on other grounds by Woolford v. Va. Dep’t of Taxation*, 294 Va. 377, 390 n.4, 806 S.E.2d 398, 405 n.4 (2017). What, then, are the available remedies under the Declaratory Judgment Act?

1. THE DECLARATION

1.1 As the statute’s name indicates, the principal remedy under the Declaratory Judgment Act is a declaration.

1.1.1 Virginia Code § 8.01-184 authorizes Virginia circuit courts “to make binding adjudications of right,” even if the “decree [is] merely declaratory of right.”

1.1.2 In other words, the parties “have their rights and relations determined and established” in the judgment. Note, *Declaratory Judgments—Development and Applicability—The Virginia Statute*, 15 Va. L. Rev. 79, 84 (1928).

1.1.3 As described by “the ‘father’ of the declaratory judgment in the United States,”² “The declaration is a conclusive determination of the rights of the parties[.]” Edwin Borchard, *DECLARATORY JUDGMENTS* 438-39 (2d ed. 1941).

¹ This is one part of a three-part presentation to the Local Government Attorneys of Virginia Fall 2019 Conference. The three parts are meant to complement each other and together should provide helpful background for practitioners. The two other parts of the presentation are prepared by Assistant City Attorney Ellen F. Bergren, City of Chesapeake, and George A. Somerville, Of Counsel, Harman Claytor Corrigan & Wellman, P.C.

² *U.S. Fid. & Guar. Co. v. Koch*, 102 F.2d 288, 290 (3d Cir. 1939); *see also Gov’t Emps. Ins. Co. v. Dizol*, 108 F.3d 999, 1013 (9th Cir. 1997); *Panama Processes S.A. v. Cities Serv. Co.*, 362 F. Supp. 735, 738 (S.D.N.Y. 1973); *Morrison-Knudsen Co. v. Wyo. State Bd. of Equalization*, 35 F. Supp. 553, 554 (D. Wyo. 1940); *Bakelite Corp. v. Lubri-Zol Dev. Corp.*, 34 F. Supp. 142, 144 (D. Del. 1940). Professor Borchard “had a larger

- 1.1.4 “The distinctive characteristic of the declaratory judgment is that the declaration stands by itself; that is to say, no executory process follows as of course.” *Id.* at 25 n.1 (quoting *Kariher’s Petition*, 284 Pa. 455, 563, 131 A. 265, 263 (1925)). By itself, the remedy of the declaration is “only a final determination, adjudication, ruling or judgment from the court.” *Id.* at 25-26.
- 1.1.5 As one Virginia commenter noted early in the history of Virginia’s Declaratory Judgment Act, “[T]he enforcement of a judgment or decree is by no means an integral part of the adjudication. The judicial function proper ends with the pronouncement of the judgment or decree. The rest is purely or largely, in most instances, ministerial. I may obtain a judgment and never take the necessary steps to enforce it. The court is not concerned with that; it rests with me.” Note, *Declaratory Judgments—Development and Applicability—The Virginia Statute*, 15 Va. L. Rev. 79, 84 (1928).
- 1.2 The purpose of the declaration “is to afford relief from the uncertainty and insecurity attendant upon controversies over legal rights, without requiring one of the parties interested so to invade the rights asserted by the other as to entitle him to maintain an ordinary action therefor.” Va. Code § 8.01-191.
 - 1.2.1 “[T]he General Assembly created the power to issue declaratory judgments to resolve disputes before the right is violated. In other words, [t]he intent of the declaratory judgment statutes is not to give parties greater rights than those which they previously possessed, but to permit the declaration of those rights before they mature.” *RECP IV WG Land Inv’rs LLC v. Capital One Bank USA, N.A.*, 295 Va. 268, 281, 811 S.E.2d 817, 824 (2018) (second alteration in original) (citations and internal quotation marks omitted).
 - 1.2.2 “[C]ourts render declaratory judgments which may guide parties in their future conduct in relation to each other, thereby relieving them from the risk of taking undirected action incident to their rights, which action, without direction, would jeopardize their interests.” *Fairfield Dev. Corp. v. City of Va. Beach*, 211 Va. 715, 717, 180 S.E.2d 533, 534 (1971) (quoting *Liberty Mut. Ins. Co. v. Bishop*, 211 Va. 414, 421, 177 S.E.2d 519, 524 (1970)).

part in promoting and drafting [the declaratory judgment acts] than any other individual.” Fleming James, Jr., *Right to A Jury Trial in Civil Actions*, 72 Yale L.J. 655, 693 n.179 (1963). Virginia courts have cited to Professor Borchard’s treatise. *E.g.*, *Erie Ins. Grp. v. Hughes*, 240 Va. 165, 170, 393 S.E.2d 210, 212 (1990); *Reisen v. Aetna Life & Cas. Co.*, 225 Va. 327, 334, 302 S.E.2d 529, 533 (1983); *Mut. Assurance Soc’y v. Graham*, 45 Va. Cir. 528, 528 (City of Richmond 1998).

1.2.3 “[T]he most useful field for the declaratory judgment is as a preventive relief, that is, for use in those cases where there has been no injury and therefore no right of action exists under the common law, but in which there is an actual controversy and the parties are desirous of ascertaining what their rights, powers, privileges or immunities are without running the risk of inflicting an injury on another or of suffering a loss.” Martin P. Burks, COMMON LAW AND STATUTORY PLEADING AND PRACTICE § 192, at 309 (4th ed. 1952 & 1961 supp.);³ accord *Am. Nat’l Bank & Tr. Co. v. Kushner*, 162 Va. 378, 386, 174 S.E. 777, 780 (1934) (“Preventive relief is the moving purpose.”).

1.2.4 In the oft-quoted words of Congressman Ralph Gilbert of Kentucky, advocating passage of the federal Declaratory Judgment Act: “Under the present law you take a step in the dark and then turn on the light to see if you have stepped in a hole. Under the declaratory judgment law you turn on the light and then take the step.” 69 Cong. Rec. 2030 (1928), *quoted in* Martin P. Burks, COMMON LAW AND STATUTORY PLEADING AND PRACTICE § 192, at 309 (4th ed. 1952 & 1961 supp.).

1.3 Thus, the Declaratory Judgment Act “is to be liberally interpreted and administered with a view to making the courts more serviceable to the people.” Va. Code § 8.01-191.

2. LIMITATIONS UPON THE DECLARATION

2.1 Of course, as noted elsewhere in these materials, the declaration of rights is not contemplated as an “advisory opinion.”

2.2 Another important limitation on the scope of the declaration is that the court “may resolve only issues that have been pleaded specifically in the petition for declaratory judgment.” *Bd. of Zoning Appeals of James City Cnty. v. Univ. Square Assocs.*, 246 Va. 290, 294, 435 S.E.2d 385, 387 (1993). Virginia courts are “not empowered to make binding adjudications of right which are not specifically pled.” *Scottsdale Ins. Co. v. Glick*, 240 Va. 283, 289, 397 S.E.2d 105, 108 (1990).

2.2.1 A note of caution is warranted here: this language does not indicate a heightened pleading standard applies to declaratory judgment actions.

2.2.1.1 “Virginia is a notice pleading jurisdiction[.]” *Preferred Sys. Sols., Inc. v. GP Consulting, LLC*, 284 Va. 382, 407, 732 S.E.2d 676, 689 (2012) (citing Va. Sup. Ct. R. 1:4(d)).

2.2.1.2 There does not appear to be any language in the Declaratory Judgment Act (or other statutes or rules) that heightens the pleading standard

³ Indicating the continuing influence of Justice Burks’ treatise, the Supreme Court of Virginia has cited it in twenty-two decisions since 2013.

thereunder. Rather, the Act “is to be liberally interpreted and administered with a view to making the courts more serviceable to the people.” See Va. Code § 8.01-191.

2.2.1.3 Still, the Rules of the Supreme Court of Virginia require that the complaint “clearly inform[] the opposite party of the true nature of the claim.” See Va. Sup. Ct. R. 1:4(d).

2.2.2 Although every case and every complaint will differ, decided cases may provide some guidance. Some examples follow:

2.2.2.1 *Bd. of Zoning Appeals of James City Cnty. v. Univ. Square Assocs.*, 246 Va. 290, 435 S.E.2d 385 (1993) (circuit court erred in declaring a condition in a special use permit unlawful, where the complaint sought a declaration that *the board of zoning appeals’ interpretation of the condition* was unlawful).

2.2.2.2 *Scottsdale Ins. Co. v. Glick*, 240 Va. 283, 397 S.E.2d 105 (1990) (circuit court erred in holding that tenants breached a lease because they obtained liability insurance from a company not licensed to do business in Virginia, where the complaint did not seek a declaration to this effect and the complaint was not amended to confirm to the proof thereof).

2.2.2.3 *Buchner v. Kenyon L. Edwards Co.*, 210 Va. 502, 171 S.E.2d 676 (1970) (circuit court erred in issuing a declaration concerning the reasonableness of the application of a restrictive covenant, where the complaint only sought a declaration that the restriction was void as a general restraint on the use of the property and contrary to public policy).

2.2.3 In some cases, the cautious practitioner may have concerns as to the degree of pleading that could eventually allow for a declaration of assistance to the client. Those concerns may suggest a more inclusive approach when drafting the complaint. At the same time, however, the practitioner must remain mindful that “[b]revity is enjoined as the outstanding characteristic of good pleading.” Va. Sup. Ct. R. 1:4(j). A balance is required: If it is questionable whether all the relief desired is covered by the pleading, err on the side of expanding the pleading to seek more relief; but do not “throw in the kitchen sink,” because this may risk making it unclear to the court what relief is being sought.

2.3 In entering a declaratory judgment, a court may not intrude upon the powers of a separate branch of government.

2.3.1 For example, where a court declares a locality’s zoning decision unlawful, it “do[es] not have the authority to rezone property. Therefore, if a court finds for the plaintiff and strikes down the local decision, it must then determine what

zoning classifications the evidence has shown to be reasonable, and then remand the case to the governing body with instructions to reconsider rezoning the property to one or the other of those zones within a period of time, generally ninety days. Should the governing body fail to act within that period, the court is then to issue a final injunction prohibiting the locality from interfering with the use of the property in any of the categories deemed reasonable on remand. The property can therefore end up ‘zoned’ to more than one use classification.” LGA, HANDBOOK OF VIRGINIA LOCAL GOVERNMENT LAW § 1-8.08, at 1-54 (2018 ed.) (citations omitted).

- 2.3.2 When two reasonable zoning classifications apply to a property, the legislative body – not the court – has the prerogative to choose between those reasonable zoning classifications. The circuit court unequivocally found that two categories were reasonable, but then it entered a decree requiring the board of supervisors to grant one of those two zoning classifications. The circuit court erred in entering this decree because the board may choose between the two, even though one use might have been more appropriate or even the most appropriate use for the land. *Bd. of Supervisors of Fairfax Cnty. v. Miller & Smith, Inc.*, 242 Va. 382, 410 S.E.2d 648 (1991).
- 2.3.3 An order of a circuit court rezoning property to a zoning district designation was erroneous because it encroached upon the board of supervisor’s legislative discretion in the contravention of the principle of separation of powers. In this case, the court had determined that the board’s denial of a zoning map amendment was arbitrary and capricious, and it first ordered the board to reconsider the zoning of the subject property and to rezone the property to a category permitting more intense use of the land within ninety days. The board inadvertently failed to do so. There were two zoning districts that it would have chosen from. After the ninety days expired, the landowner returned to circuit court for an order enforcing its earlier order, and the circuit court entered an order enjoining the board from taking any action to prevent the use or development of the subject property in accordance with one of those two zoning districts. *Bd. of Supervisors of Fairfax Cnty. v. Farley*, 216 Va. 816, 223 S.E.2d 874 (1976).
- 2.3.4 However, the power to declare an ordinance invalid “is a determination within the sole province of the judiciary.” *Town of Jonesville v. Powell Valley Vill. L.P.*, 254 Va. 70, 74, 487 S.E.2d 207, 210 (1997).

3. FURTHER RELIEF

- 3.1 “Further relief based on a declaratory judgment order or decree may be granted whenever necessary or proper. The application shall be by motion to a court having jurisdiction to grant the relief. If the application is deemed sufficient the court shall, on reasonable notice, require

an adverse party whose rights have been adjudicated by the declaration of right to show cause why further relief should not be granted forthwith.” Va. Code § 8.01-186.

- 3.1.1 Justice Burks commented that this section “provide[s] for consequential relief where a party refuses to abide by the declaration made by the court.” Martin P. Burks, COMMON LAW AND STATUTORY PLEADING AND PRACTICE § 196, at 319 (4th ed. 1952 & 1961 supp.).
 - 3.1.2 According to Professor Borchard, “‘Further relief’ obviously means coercive or executory relief which may be granted on the original petition or a subsequent motion or petition. This merely carries out the principle that every court, with few exceptions, has inherent power to enforce its decrees and to make such orders as may be necessary to render them effective.” Edwin Borchard, DECLARATORY JUDGMENTS 441 (2d ed. 1941) (footnote omitted). He also acknowledges that “the ‘further’ or coercive relief could have been demanded in combination with the declaration, in the same action.” *Id.*
 - 3.1.3 The Supreme Court of Virginia has observed that, in addition to the declaration, “coercive relief may be demanded – that is, the rights of the parties may not only be determined, but they may be enforced, in the one action.” *Winborne v. Doyle*, 190 Va. 867, 871-72, 59 S.E.2d 90, 93 (1950).
 - 3.1.4 “Consequential or executory relief may be demanded either in association with or as a supplement to declaratory relief, should the declaration not be observed and coercion become necessary. . . . Whether or not the original declaratory judgment or decree reserves the liberty to apply for further relief, if necessary, such liberty is always implied and the American statutes make special provision for it.” Edwin Borchard, DECLARATORY JUDGMENTS 439 (2d ed. 1941) (footnotes omitted).
 - 3.1.5 “Consequential or incidental relief may be obtained in an action in which a declaratory judgment is sought, but the failure to seek such relief in such action or suit does not constitute a bar to other proceedings to enforce the rights determined by the judgment, whether such other proceeding is by petition filed in that cause or in a separate and independent action.” *Winborne v. Doyle*, 190 Va. 867, 873, 59 S.E.2d 90, 94 (1950).
- 3.2 Litigants have unsuccessfully sought to extend the provision for “further relief” to other sorts of orders and judgments. For instance, the provision for “further relief” is not an independent authorization for attorney’s fees. *Russell Cnty. Dep’t of Soc. Servs. v. O’Quinn*, 259 Va. 139, 142, 523 S.E.2d 492, 493 (2000). “Rather, that term permits a court to enter necessary orders to implement or enforce a declaratory judgment entered by the court.” *Id.*
- 3.2.1 Concerning attorney’s fees, further note the following: “The plain language of the Declaratory Judgment Act does not authorize a court to make an award of

attorney's fees. Nonetheless, in some instances an award of attorney's fees may be proper in an action seeking declaratory relief if such an award is authorized by another statute or contract implicated in the action. In order for a court to award attorney's fees in such cases, the party seeking the award must show that the statute or contract that authorizes such awards is applicable to the judgment obtained." *Bd. of Supervisors of James City Cnty. v. Windmill Meadows, LLC*, 287 Va. 170, 184, 752 S.E.2d 837, 845 (2014) (citations and internal quotation marks omitted).

- 3.2.2 Note, however, the provision for costs in the Declaratory Judgment Act: "The costs, or such part thereof as the court may deem proper and just in view of the particular circumstances of the case, may be awarded to any party." Va. Code Ann. § 8.01-190. Justice Burks' treatise indicates that "[t]he matter of costs is in the sound discretion of the court." Martin P. Burks, *COMMON LAW AND STATUTORY PLEADING AND PRACTICE* § 196, at 320 (4th ed. 1952 & 1961 supp.).

4. SUFFICIENT GROUNDS FOR INJUNCTION

- 4.1 "The pendency of any action at law or suit in equity brought merely to obtain a declaration of rights or a determination of a question of construction shall not be sufficient grounds for the granting of any injunction." Va. Code § 8.01-189.
- 4.2 Referring to this as "the enigmatic anti-injunction provision," Professor Sinclair has noted that the Supreme Court of Virginia's "only two decisions mentioning this statute do not provide any characterization of its purpose or effect, or even indicate when it applies." Kent Sinclair, *VIRGINIA REMEDIES* § 4-4 (2018) (citing *Williams v. S. Bank*, 203 Va. 657, 664, 125 S.E.2d 803, 807 (1962); *Gloth v. Gloth*, 154 Va. 511, 153 S.E. 879 (1930)).
- 4.2.1 Suggesting two alternative interpretations of Va. Code § 8.01-189, Professor Sinclair refers to the following as "mak[ing] eminent sense": "Barring an injunction against an adversary party based exclusively upon one party's having filed a declaratory action, or obtained a declaratory ruling." *Id.*
- 4.2.2 "Declaratory and injunctive relief have many attributes in common but they are distinct legal remedies that may or may not be sought together in the same action. Although the result may be similar in both types of actions because each involves a court determination regarding the propriety of a particular course of action, *declaratory relief involves a lesser showing than injunctive relief*, and does not contain the coercive element of an injunction. A judge may determine that plaintiffs are entitled to declaratory relief, while at the same time denying the issuance of injunctive relief for mootness or on equitable grounds." *Id.*
- 4.2.3 Professor Sinclair's interpretation appears to be consistent with Justice Burks': "This section would not prohibit the joining of a request for an injunction and a

declaratory decree, where proper matter for the issuance of an injunction was alleged, nor would it prohibit the issuance of an injunction where consequential relief is sought along with the declaration of rights. In short if there are independent grounds for an injunction outside of the mere pendency of an action seeking merely a declaration of rights, the injunction may properly issue.” Martin P. Burks, COMMON LAW AND STATUTORY PLEADING AND PRACTICE § 196, at 320 (4th ed. 1952 & 1961 supp.).

5. DECLARATIONS IN LOCAL-GOVERNMENT MATTERS

5.1 Not to overlook the possible limitations on the availability of a declaratory judgment (discussed elsewhere herein), the declaration (where available) can be particularly useful in addressing local-government matters.

5.1.1 Since early on in the history of the declaratory judgment acts, it has been acknowledged that “[t]he law of municipal corporations, generally, has been a fertile field for declaratory relief.” Note, *The Declaratory Judgment in Public Law*, 43 Harv. L. Rev. 1290, 1292 (1930).

5.1.2 As stated in a more recent commentary, “Many legal issues in local government involve the interpretation and definition of the public powers of a local government entity and its officials or draw into question the construction and import of a variety of documents including public contracts and franchises, bond issues, insurance policies and suretyship instruments such as public official, public contract, and license and permit security bonds.” John Martinez, LOCAL GOVERNMENT LAW § 29:6 (2019).

5.1.3 While Va. Code § 8.01-184 specifically lists certain controversies on which a declaration may issue, “this enumeration does not exclude other instances of actual antagonistic assertion and denial of right.”

5.1.4 Some of the subjects of the declaration are particularly well-suited to local-government issues: “[c]ontroversies involving the interpretation of . . . statutes, municipal ordinances and other governmental regulations[.]” Va. Code § 8.01-184.

5.1.5 Controversies involving the interpretation of “instruments of writing” will also be of interest in the local-government setting. *Id.*

5.2 Thus, Virginia courts have been asked to issue declarations on a wide variety of local-government issues. A nonexclusive list of examples follows:

5.2.1 *Bd. of Supervisors of James City Cnty. v. Windmill Meadows, LLC*, 287 Va. 170, 752 S.E.2d 837 (2014) (declaration for plaintiff developers and Williamsburg Landing

to the effect that a statutory limitation on collection and acceptance of cash proffers for residential construction on a per-dwelling or per-home basis (until after completion of final inspection but before issuance of certificate of occupancy) applied to proffer agreements entered before the statute's effective date).

- 5.2.2 *Fein v. Zand 78, LLC*, No. 140927, 2015 Va. Unpub. LEXIS 21 (July 31, 2015); *Fein v. Payandeh*, 284 Va. 599, 734 S.E.2d 655 (2012) (declarations sought concerning whether a county subdivision violated a restrictive covenant requiring compliance with a county subdivision ordinance).
- 5.2.3 *Umstattd v. Centex Homes, G.P.*, 274 Va. 541, 650 S.E.2d 527 (2007) (reversing award of mandamus and denial of declaratory judgment, and remanding for further proceedings on the landowner's action seeking declarations that it had a right to have its rezoning application accepted and processed by town officials and that any local ordinance or regulation authorizing the town to refuse the application was unlawful).
- 5.2.4 *Williams v. Augusta Cnty. Sch. Bd.*, 248 Va. 124, 445 S.E.2d 118 (1994) (affirming, on the merits, circuit court's decision in declaratory-judgment action that the Conflict of Interests Act prohibited the school board from considering plaintiff (sister-in-law of board chair) for a county teaching position).
- 5.2.5 *Harris v. Ingram*, 240 Va. 46, 392 S.E.2d 816 (1990) (affirming, on the merits, circuit court's decision in city council member's declaratory-judgment action that Conflict of Interests Act did not require unanimous resolution allowing another council member to participate in competitive sealed bidding on a city contract).
- 5.2.6 *Nuckols v. Moore*, 234 Va. 478, 362 S.E.2d 715 (1987) (reversing dismissal and remanding for further proceedings on the plaintiff's declaratory-judgment action seeking an adjudication of rights to build windmills under local law and a writ of mandamus compelling issuance of building permits).
- 5.2.7 *West v. Jones*, 228 Va. 409, 323 S.E.2d 96 (1984) (affirming circuit court's declaration that the Conflict of Interests Act prohibited defendant mayor (also a city school principal) from voting on appointments to the school board, in action filed by school board members and one city council member).
- 5.2.8 *Bd. of Supervisors of Fairfax Cnty. v. Southland Corp.*, 224 Va. 514, 297 S.E.2d 718 (1982) (reversing, on the merits, circuit court's declaration for plaintiff "quick-service food store" challenging zoning ordinances that distinguished plaintiff from other grocery stores and similar retail uses).

- 5.2.9 *Strong v. Orange Cnty. Bd. of Supervisors*, 85 Va. Cir. 396 (Orange Cnty. 2012) (declaratory judgment that the county's subdivision ordinance was not authorized by Va. Code §§ 15.2-2241 and -2242 and, therefore, void under Dillon Rule).
- 5.2.10 *Town of Saltville v. Surber*, 83 Va. Cir. 161 (Smyth Cnty. 2011) (demurrer overruled as to town's action seeking a declaration concerning its obligations under the Freedom of Information Act).
- 5.2.11 *City Council of Richmond v. Wilder*, 73 Va. Cir. 471 (City of Richmond 2007) (demurrer overruled as to city council's action seeking a declaration concerning its powers and duties under the City Charter, relative to the powers and duties of the mayor, director of human resources, and acting chief administrative officer, concerning appointments of certain city employees).
- 5.2.12 *Broad Run Vill. v. Bd. of Supervisors of Loudoun Cnty.*, 60 Va. Cir. 391 (Loudoun Cnty. 2002) (allowing declaratory-judgment action to proceed on the question whether certain provisions of a comprehensive plan violated Dillon Rule, based on alleged conditions precedent to the extension of water and sewer service).
- 5.2.13 *Lindsey Trusts v. City of Alexandria*, 46 Va. Cir. 174 (City of Alexandria 1998) (declaratory judgment issued to the effect that a provision of the city zoning ordinance – requiring special use permits for increases in the intensity of grandfathered uses – was not authorized by the city charter and, therefore, void under Dillon Rule).
- 5.2.14 *Pima Gro Sys, Inc. v. Bd. of Supervisors of King George Cnty.*, 52 Va. Cir. 241 (King George Cnty. 2000) (declaring that the board of supervisors lacked authority to enter into a consent decree allowing activity that was prohibited under its zoning ordinances and, further, declaring the agreement void ab initio notwithstanding the fact that it was incorporated into a consent decree).
- 5.2.15 *Moore Bros. v. Augusta Cnty.*, 5 Va. Cir. 454 (Augusta Cnty. 1974) (demurrers of the county and zoning administrator overruled as to business's action seeking a declaration concerning interpretation and enforcement of the County's zoning ordinance).

6. RELATIONSHIP TO INJUNCTION AND EXTRAORDINARY REMEDIES IN LOCAL-GOVERNMENT MATTERS

6.1 Among other things, the provision for the declaratory remedy in the Declaratory Judgment Act was meant to facilitate litigation of public questions. More traditional remedies were less flexible, and the issuance of the remedy might have involved prerequisites and burdens that are done away with in the Declaratory Judgment Act.

- 6.1.1 “It is manifest that, when the cumbersome and technical writs of certiorari, injunction, mandamus, quo warranto, habeas corpus, prohibition, are directed against public bodies and officials, what is primarily sought is an adjudication on the law, establishing and determining their powers and privileges.” Edwin Borchard, *DECLARATORY JUDGMENTS* 875 (2d ed. 1941).
- 6.1.2 “Controversies touching the legality of the acts of public officials, or public agencies, challenged by parties whose interests are adversely affected, is one of the favored fields for such declaratory judgment, styled in the act and in the authorities, the ‘declaration.’ Official action, done or threatened, challenged as unlawful, a usurpation of official power, whether lack of [official] authority appears in the terms of the statutes, or because of unconstitutionality thereof, are said to be determinable in this manner” *Id.* at 888 (alteration in original) (quoting *Scott v. Ala. State Bridge Corp.*, 233 Ala. 12, 17, 169 So. 273, 277 (1936)).
- 6.2 As noted above, an injunction may overlap with a declaratory judgment. *See Winborne v. Doyle*, 190 Va. 867, 871-72, 59 S.E.2d 90, 93 (1950). As a general matter, however, the declaration will be more likely to issue as a lesser showing is required. *See Kent Sinclair*, *VIRGINIA REMEDIES* § 4-4 (2018).
- 6.3 As for the “extraordinary remedies,” Justice Burks’ treatise noted that (in its time) the only such civil remedies “in common use” were mandamus, prohibition, quo warranto, and certiorari. Martin P. Burks, *COMMON LAW AND STATUTORY PLEADING AND PRACTICE* § 199, at 322 (4th ed. 1952 & 1961 supp.).
- 6.3.1 “Mandamus is an extraordinary remedy that may be used to compel performance of a purely ministerial duty, but it does not lie to compel the performance of a discretionary duty. A writ of mandamus may be issued only when there is a clear right to the relief sought, a legal duty to perform the requested act, and no adequate remedy at law.” *Ancient Art Tattoo Studio v. City of Va. Beach*, 263 Va. 593, 597, 561 S.E.2d 690, 692 (2002) (citations and internal quotation marks omitted). “Where the official duty in question involves the necessity on the part of the officer of making some investigation, and of examining evidence and forming his judgment thereon *mandamus* will not lie.” *Id.* at 598, 561 S.E.2d at 693 (citation omitted). *See also* Va. Code §§ 8.01-644 through -653.1.
- 6.3.2 A writ of prohibition “is issued to restrain inferior courts from acting without authority of law where damage or injustice is likely to follow from such action. It is never allowed to usurp the functions of a writ of error.” *Bd. of Supervisors of Hanover Cnty. v. Bazile*, 195 Va. 739, 747, 80 S.E.2d 566, 572 (1954). “[I]t is not a writ of right, but one of sound judicial discretion, to be granted or withheld according to the circumstances of each particular case.” *Id.* *See also* Va. Code §§ 8.01-644 through -653.1.

- 6.3.3 “[*Q*]uo warranto is an appropriate writ to determine the right to a public office and to oust one who intrudes into, usurps or unlawfully holds the same[.]” *Dotson v. Commonwealth*, 192 Va. 565, 569, 66 S.E.2d 490, 492 (1951). *See also* Va. Code §§ 8.01-635 through -643.
- 6.3.4 “*Certiorari* is a common-law writ, issued from a superior court directed to one of inferior jurisdiction, commanding the latter to certify and return to the former the record in the particular case.” *Town of Appalachia v. Mainous*, 121 Va. 666, 674, 93 S.E. 566, 569 (1917) (citation omitted). “[*C*]ertiorari brings up the record for inspection only, . . . the writ is issued in order that the court issuing the writ may inspect the proceedings and determine whether there has been any material *irregularity* therein[.]” *Id.* at 675, 93 S.E. at 569 (citations and internal quotation marks omitted).
- 6.4 Although the availability of (and interaction with) other writs should not be overlooked, the relationship of the declaratory judgment to the writs of certiorari and mandamus are noteworthy in land use cases.
- 6.5 Virginia Code § 15.2-2314 expressly provides that a person aggrieved by a decision of a board of zoning appeals may seek review of the board’s decision through a petition for writ of certiorari.
- 6.5.1 “The certiorari process does not authorize a trial court to rule on the validity or constitutionality of legislation underlying a board of zoning appeals decision. Such challenges must be presented by an appropriate further action, generally for declaratory judgment.” LGA, HANDBOOK OF VIRGINIA LOCAL GOVERNMENT LAW § 1-10.04, at 1-62 (2018 ed.) (citations omitted).
- 6.5.2 Seeking review of the board’s decision through a writ of certiorari does not preclude the petitioner from also challenging the underlying ordinance through an action for declaratory judgment. *See Matthews v. Bd. of Zoning Appeals of Greene Cnty.*, 218 Va. 270, 284, 237 S.E.2d 128, 136 (1977).
- 6.5.3 Thus, in an appropriate case, a litigant may seek to proceed with a writ of certiorari on the board of zoning appeal’s decision while also raising a declaratory judgment claim as to the validity of the ordinance underlying the board’s decision.
- 6.6 In the local government context, also note that the availability of a writ of mandamus or a declaratory judgment could hinge on whether there is judgment or discretion involved in the official action that is the subject to the challenge.
- 6.6.1 If there is official judgment or discretion involved, the preferred remedy would appear to be the declaration. *See, e.g., Umstattd v. Centex Homes, G.P.*, 274 Va. 541, 547, 650 S.E.2d 527, 531 (2007) (“In order to determine whether the

application was ‘incomplete’ and contained ‘deficiencies,’ the official was required by . . . the ordinance to ascertain whether waivers were necessary as to these and the other disputes between the parties. The official’s task was not purely ministerial. It involved the application of law to a complex set of facts and required the exercise of judgment. It was therefore not subject to compulsion by mandamus.”).

6.6.2 However, if the challenged official action is strictly a matter of a ministerial duty, and the claims have fully matured, then mandamus would seem to be more appropriate. See *Bd. of Supervisors of Prince William Cnty. v. Hylton Enters., Inc.*, 216 Va. 582, 585-86, 221 S.E.2d 534, 537 (1976). However, “[m]andamus may not be granted to redress the past deprivation of a right or the restoration of a right in the future. Its purpose is to command and not to correct an erroneous decision.” *Sterling Land Corp. v. Planning Comm’n of Town of Hamilton*, 51 Va. Cir. 307, 309 (Loudoun Cnty. 2000) (quoting *Mountain Venture P’ship Lovettsville II v. Town of Lovettsville Planning Comm’n*, 26 Va. Cir. 50, 53 (Loudoun Cnty. 1991)).

6.6.3 Where the difference is difficult to determine, the litigant may wish to consider proceeding with the petition for a writ of mandamus alongside the declaratory-judgment action. Cf. *Umstattd v. Centex Homes, G.P.*, 274 Va. 541, 650 S.E.2d 527 (2007) (reversing award of mandamus and denial of declaratory judgment, and remanding for further proceedings on the declaratory judgment action); *Bd. of Supervisors of Prince William Cnty. v. Hylton Enters., Inc.*, 216 Va. 582, 585-86, 221 S.E.2d 534, 537 (1976) (“[W]here the issues have been fairly joined, the rights of the parties have been fully protected, and the trial court has made an adjudication of the controversy on the merits in mandamus proceedings, when a declaratory judgment should have been sought, the procedural error is harmless.”).

6.7 Before filing a declaratory judgment action or pursuing an extraordinary writ, it is important to consider whether there is a statute authorizing a particular action stemming from a local-government matter. Cf., e.g., *Sterling Land Corp. v. Planning Comm’n of the Town of Hamilton*, 51 Va. Cir. 307, 309-10 (Loudoun Cnty. 2000) (rejecting planning commission’s argument that plaintiff essentially sought an unavailable writ of mandamus, where the complaint was “clearly styled as an appeal pursuant to § 15.2-2260(E)”).

6.7.1 E.g., Va. Code § 15.2-2259(C) (“If the commission or other agent fails to approve or disapprove the plat within 60 days after it has been officially submitted for approval, or within 45 days after it has been officially resubmitted after a previous disapproval or within 35 days of receipt of any agency response pursuant to subsection B, the subdivider, after 10-days’ written notice to the commission, or agent, may petition the circuit court for the locality in which the land involved, or the major part thereof, is located, to decide whether the plat should or should not be approved. The court shall give the petition priority on the civil docket, hear the matter expeditiously in accordance with the procedures prescribed in Article 2 of

Chapter 25 of Title 8.01 and make and enter an order with respect thereto as it deems proper, which may include directing approval of the plat.”);

- 6.7.2 *id.* § 15.2-2259(D) (“If a commission or other agent disapproves a plat and the subdivider contends that the disapproval was not properly based on the ordinance applicable thereto, or was arbitrary or capricious, he may appeal to the circuit court having jurisdiction of such land and the court shall hear and determine the case as soon as may be, provided that his appeal is filed with the circuit court within 60 days of the written disapproval by the commission or other agent.”);
- 6.7.3 *id.* § 15.2-2260(D) (“If the commission or other agent fails to approve or disapprove the preliminary subdivision plat within 90 days after it has been officially submitted for approval, the subdivider after 10 days' written notice to the commission, or agent, may petition the circuit court for the locality in which the land involved, or the major part thereof, is located to enter an order with respect thereto as it deems proper, which may include directing approval of the plat.”);
- 6.7.4 *id.* § 15.2-2260(E) (“If a commission or other agent disapproves a preliminary subdivision plat and the subdivider contends that the disapproval was not properly based on the ordinance applicable thereto, or was arbitrary or capricious, he may appeal to the circuit court having jurisdiction of such land and the court shall hear and determine the case as soon as may be, provided that his appeal is filed with the circuit court within 60 days of the written disapproval by the commission or other agent.”).

7. SUSPENDED, PROSPECTIVE, AND RETROSPECTIVE DECLARATIONS

- 7.1 The effective date of a declaration may be suspended. For instance, suspension of a declaration may be ordered to allow a locality time to consider further legislative action when confronted with the situation where land is left unzoned on account of a declaration that a zoning regulation is unlawful. *See Bd. of Supervisors of James City Cnty. v. Rowe*, 216 Va. 128, 148-49, 216 S.E.2d 199, 215 (1975).
- 7.2 However, suspension is not a per se rule. Where the effect of an ordinance's declared invalidity is to leave land unzoned, and the land was unzoned prior to the ordinance's enactment and the requested land use would have been approved but for the unlawful enactment, the court will not suspend its declaration to allow additional time for a new enactment. *See Matthews v. Bd. of Zoning Appeals of Greene Cnty.*, 218 Va. 270, 283, 237 S.E.2d 128, 135-36 (1977).
- 7.3 Instead of suspending the declaration, the court could treat the declaration as prospective only (and not retrospective). Such a prospective declaration of invalidity would not affect other amendments to the zoning ordinance enacted prior to the court's issuance of the

declaration. See *Town of Jonesville v. Powell Valley Vill. L.P.*, 254 Va. 70, 76-77, 487 S.E.2d 207, 211-12 (1997); *City Council of Alexandria v. Potomac Greens Assocs. P'ship*, 245 Va. 371, 378, 429 S.E.2d 225, 228 (1993).

- 7.4 An example of how the power to suspend has been exercised when the equities seem to favor suspension can be found in *Purcellville v. Potts*, 179 Va. 514, 19 S.E.2d 700 (1942). Although not a declaratory judgment action, in that case, the Supreme Court of Virginia affirmed a judgment that the Town was violating Potts' riparian rights and issued a mandatory injunction requiring the Town to demolish its dams. The circuit court and then the Supreme Court suspended the injunction to give the Town an opportunity to condemn the plaintiffs' water rights in the stream.